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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

RJM ENTERPRISES, INC. et al., Plaintiffs, Cross-defendants and Appellants, v. RIVER JUNCTION RECLAMATION DISTRICT NO. 2064 et al., Defendants, Cross-complainants and Appellants.	C037402 (Super. Ct. No. 291299)

Plaintiffs RJM Properties, Inc. (RJM) and Tri-M Farms (Tri-M) purchased agricultural properties at the conjunction of the Stanislaus and San Joaquin Rivers. Water from irrigation and other sources flowed across the land and backed up in the lower fields. Plaintiffs' principals had previously managed the land and were aware of the water intrusion there prior to purchase. Plaintiffs made a number of improvements, including replacing

the main drainage ditch known as Red Bridge Slough with a pipeline, to render the land more suitable for growing grapes. When water continued to back up, plaintiffs sued River Junction Reclamation District No. 2064 (District) and its irrigation committee, Bret Harte Water Users Irrigation District (Bret Harte), contending the water flowing onto the land was unreasonable and the drainage inadequate. Defendants filed a cross-complaint alleging that they had prescriptive easements to discharge water across plaintiffs' property. After a bench trial, the trial court ruled in favor of defendants, finding that the prescriptive easements existed, which defeated plaintiffs' claims of trespass, nuisance and inverse condemnation, but not their negligence claim. As to the negligence claim, the court found defendants had not breached the duty to provide drainage.

Plaintiffs claim the easements fail to state specifically the amount of water allowable, but this level of exactitude is not required to define the scope of a prescriptive easement established by historical use. Plaintiffs also contend the fourth easement for Red Bridge Slough should not have been granted because it was not pled. However, it was within the court's power to grant this easement, because defendants' pleadings expressly alleged that the easements identified drained into Red Bridge Slough, and the evidence at trial showed and the court found that the slough had been the key water conveyance on plaintiffs' property since the early days of the District. Plaintiffs also contend the easements are not a

sufficient defense to their claims because the easements did not permit defendants to "store water" on the property. By storing water, plaintiffs refer to the water backup from slow drainage, a historical feature of the property. Periodic backup from water flow does not require an easement to store water. Defendants have not constructed and maintained a reservoir on plaintiffs' property.

We part company with the trial court regarding the disposition of plaintiffs' negligence claim. Case law has long recognized that a prescriptive easement is a defense against a claim that a property owner would otherwise have for negligent discharge of water. We therefore need not determine whether defendants were negligent in allowing water to flow across plaintiffs' land without providing for more expeditious drainage.

The easements, however, do not encompass the situation that occurred after a flood and levee break in 1997. Plaintiffs allege the District was negligent in failing quickly to drain water from their property. The trial court found that defendants were not negligent in this respect. We conclude that this finding is supported by substantial evidence. Plaintiffs do not claim defendants were liable for the flooding and cite no authority for the proposition that defendants were required to make extraordinary efforts to drain the property after a flood. The deficiencies defendants point to in the drainage system after the flood are the same ones they complain of generally.

But plaintiffs' own expert testified that defendants' drainage system operated "fairly well."

Defendants filed a cross-appeal requesting changes in the phrasing of two easement descriptions and the addition of a permanent injunction against interference with the easements. We cannot modify the judgment in this fashion because the record is not clear regarding the true location of the easements. To adjudicate a permanent injunction would require this court to consider matters outside the record and subsequent to the judgment. Accordingly, we will reverse the judgment as to the two easement descriptions and remand for a new trial on this issue. To the extent plaintiffs are interfering with the easements granted by the judgment, defendants may seek relief in the superior court to enforce the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The District is a public agency formed in 1923 by the San Joaquin County Board of Supervisors. It is made up of 5,783 acres located at the conjunction of the Stanislaus and San Joaquin Rivers. Without reclamation works -- that is, levees and drainage works -- the land was subject to flooding during a large portion of the year by the waters of those rivers. In 1923, a levee had been constructed around the District, but the levee required maintenance and protective work. According to the board's order forming the District, there also was "need of an increased and extended drainage system" so that the land would "be properly and entirely reclaimed and devoted to agricultural purposes . . . ." Over the years, the District has

installed and maintained facilities used for irrigation, drainage, and flood control.

Bret Harte is a committee of the District, not a separate agency, formed in 1964, to operate and maintain the irrigation system serving landowners within a portion of the District. Bret Harte provides irrigation water pumped from the Stanislaus River to some but not all of the farms within the District.

Plaintiffs RJM and Tri-M are among the landowners in the District who do not use Bret Harte irrigation water. The principals of RJM and Tri-M are Paul and Ron McManis. RJM and Tri-M acquired between them several hundred acres of land within the District in the 1990's, intending to plant wine grapes. At least some of this land is very low-lying and some borders on the San Joaquin River levee. In the 1980's, Paul McManis had worked as a manager farming wine grapes for a vineyard that owned a portion of this land; he was familiar with the advantages and disadvantages of farming this property. Ron McManis also worked in grape production on these properties during the 1980's.

Water comes onto plaintiffs' property from several sources -- manmade and natural -- including excess irrigation water, rainfall, river seepage, and levee breaks.

A drainage canal or ditch known as Red Bridge Slough formerly ran east to west across the property owned by RJM and Tri-M, and, at the time of trial, continued to run as an open water conveyance to the west of their property line at Airport Road. Red Bridge Slough functioned as the main drain for rain,

river, and irrigation water for most of the land in the District. Red Bridge Slough in its former state meandered through plaintiffs' property along Division Avenue east of Airport Road and then exited their property near where Division Avenue met Airport Road. The slough went under Airport Road through three 60-inch pipes, on its way across other properties to the San Joaquin River.

Richard Pires, who owned the portion of plaintiffs' property where Division Road met Airport Road from 1972 until 1995, testified at trial that "the bottom flooded a little bit" and observed that it was "natural" because the land was "so low." Even in a dry year, Mr. Pires testified, the "lower part" of the property "might get in five or ten feet [of water] in the field." A map in the record indicated that at one point a pond or lake known as McMullen's Lake existed at the point where Red Bridge Slough passed under Airport Road.

Upon acquiring the properties, RJM and Tri-M replaced Red Bridge Slough with an underground pipeline across their property to Airport Way. The slough remained an open ditch on the other side of the road. By encapsulating the slough, plaintiffs expected to gain more ground to cultivate. However, a pipeline conveys water, but does not drain as an open ditch does by allowing seepage back into the surrounding fields. Water that flowed through the pipe into the 60-inch culverts ran into the water already in the open slough. The water level in the slough restricted the flow of water draining from plaintiffs' land, and water backed up onto plaintiffs' property.

However, Ron McManis testified that the level or volume of water intrusion on the property since plaintiffs acquired the land, including the water backup from Red Bridge Slough at Airport Way, had not changed from when plaintiffs formerly managed these properties.[1]

In 1995, plaintiffs were unable to plant grapes in the field at the corner of Airport Way and Division Avenue due to high water in Red Bridge Slough and the field. In the same year, plaintiffs were also unable to plant grapes in two fields adjacent to the San Joaquin River and a small field near a small pond on their property. Plaintiffs installed pumps and other

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[1] Ron McManis testified:

"Q. Ron, you described a number of sources of water intrusion on the properties you own and manage in this case. [¶] Do you recall that testimony?

"A. Yes, that's correct.

"Q. Since acquiring these parcels or becoming involved in their management, has the level or volume of that water intrusion changed in any way?

"A. I don't think so. I think it's been about the same."

Mr. McManis also testified:

"Q. During the period of time that you were managing the fields, which are the subject of this litigation, prior to the acquisition by RJM, did you experience any backup of water at what is now -- what you refer as the beginning of Red Bridge Slough on the west side of Airport Way?

"A. Yeah, I would say the fact that -- through my observations, I would say the fact that the -- the level in Red Bridge Slough, given the -- keeping the ratio at the same time of year, hasn't changed a whole lot since that time."

drainage facilities to prevent the accumulation of water on their parcels.

In 1995, plaintiffs asked the District to take steps to relieve water intrusion on their land, including reducing excess irrigation water and operating a pump adjacent their property. Plaintiffs promised to take legal action if such steps were not taken. Plaintiffs apparently were dissatisfied with the response and, in 1996, filed separate suits against the District and Bret Harte. After consolidation and amendment, plaintiffs' complaint asserted claims for inverse condemnation, public and private nuisance, negligence, and trespass, seeking damages and injunctive relief.[2]

Defendants responded to the suit with a cross-complaint for a temporary restraining order, preliminary and permanent injunction, and damages, alleging that plaintiffs interfered with the District's prescriptive easement for a drain used for surface and irrigation water drainage. This drain connected with Red Bridge Slough on plaintiffs' property. The cross-complaint described the drain as "drain[ing] into Red Bridge Slough." The cross-complaint attached a map "depicting the

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[2] Plaintiffs sued several individual defendants who were trustees of the District and Bret Harte. On a motion for summary judgment, the trial court dismissed these defendants based on immunities given trustees and board members under Government Code section 820.9. At the commencement of trial, plaintiffs also stipulated to the dismissal of their public nuisance claim.

location of the easement for drainage" by highlighting the path of the Red Bridge Slough.

Based on the cross-complaint and supporting declarations, the trial court issued a temporary restraining order enjoining plaintiffs from impairing or obstructing surface and irrigation water drainage in the District, and an order to show cause why a preliminary injunction should not be entered. After briefing, the court granted the preliminary injunction, finding that defendants were likely to prevail at trial because an "easement by prescription may exist based on the historic uses or occurrences on the land."

In the meantime, the District filed an amended cross-complaint, asserting interference with the District's easements in four drains, and sought, inter alia, preliminary and permanent injunctive relief and damages.[3] Three out of the four drains were described as facilities which "drain[ed] into Red Bridge Slough." The amended cross-complaint also attached a map of the drain easements that depicted the path of the Red Bridge Slough across plaintiffs' properties, and the drains connected to it.

After a bench trial, the superior court issued a tentative decision ruling that defendants had established the existence of a prescriptive easement to discharge surface and irrigation

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[3] At the commencement of trial, defendants stipulated to the dismissal of their private nuisance cause of action and their claims for monetary damages.

water across plaintiffs' property. The tentative decision did not specify the particular drain locations where the defendants asserted prescriptive easements existed.

However, the court discussed extensively the significance of Red Bridge Slough to drainage across and from plaintiffs' property: "One [of] the chief features of District 2064 is Red Bridge Slough, a natural water course running in a generally east/west direction across the District. It is clear that Red Bridge Slough traverses Plaintiffs' property although the parties disagree as to Red Bridge Slough's length, width, depth, maintenance, historic boundaries or banks, etc. However, it is apparent to the Court that this water course has always been one of the chief components in drainage of the subject property and of the entire District. [¶] . . . [¶]

"A number of modifications have been made by Plaintiffs to the subject land which directly or indirectly involved Red Bridge Slough. These include construction of tile drains, the installation of a headwall and pond where the three 60-inch pipes pass under Airport Way at Red Bridge Slough, and the burying of a 36-inch concrete pipe along a portion of Red Bridge Slough's traditional course, intended to encapsulate some of the water which previously flowed through Red Bridge Slough. This latter improvement is referred to by Plaintiffs as the 'main drain.' Aerial photographs and maps from 1923 to present clearly illustrate the changes this area has undergone. Some features shown on original maps have simply disappeared, such as 'McMullins Lake' [*sic*], a lake or pond apparently located on

Plaintiffs' property and connected to Red Bridge Slough but which appears to no longer exist. The mechanics of how this lake disappeared are not clear to the court."

The court also pointed to evidence of drainage via the Red Bridge Slough as establishing use of the plaintiffs' property for five years, an essential element of a prescriptive easement: "The record is replete with references to runoff, over and across Plaintiffs' property, either from seasonal surface water or irrigation tail water. The largest part of such water flows or percolates toward Parcel R-9, where the three 60-inch pipes pass under Airport Way and into Red Bridge Slough. This is also the same location identified on numerous maps and documents in evidence at trial as reflecting the historic course of Red Bridge Slough and the former location of McMullins Lake [*sic*].

"It is collaterally noted that the parties disagree over many things including whether certain areas are or [were ever] part of Red Bridge Slough. Plaintiff is apparently of the opinion that Red Bridge Slough ends at Airport Way and no longer exists, actually or legally east of that location. The former channel of flow east of the aforementioned 60-inch pipes is now referred to by Plaintiff consistently as the 'main drain.' This characterization apparently is based on Plaintiff's installation of a buried 36-inch concrete pipe intended to encapsulate water flowing toward the undercrossing at Airport Way which is located on Plaintiffs' land just south of Division Road. In spite of the sobriquet by which it is referred to, it is clear to the Court from Exhibit 505 that the initial map of the District

shows Red Bridge Slough originally extended eastward from Airport Way (formerly Durham Ferry Road) at least as far as the area near Garden Avenue (now abandoned). The upshot of this is that Red Bridge Slough ran all the way across Plaintiffs' property. It was one of the main water courses within District 2064. Although seven decades have brought substantial changes to its configuration, its existence is a fact faced by every property owner since the creation of District 2064." (Underscoring in original.)

The court held that the defendants' prescriptive easement defeated plaintiffs' claims of nuisance, trespass, and inverse condemnation. As to plaintiffs' remaining negligence claim, the court determined plaintiffs failed to establish by a preponderance of the evidence that the District breached a duty to provide sufficient drainage for plaintiffs to grow grapes.

Plaintiffs requested a statement of decision and the parties submitted proposed content. Among other things, plaintiffs' submission informed the court the parties stipulated that one of the four drains pled as easements in the amended cross-complaint was not on plaintiffs' property and therefore irrelevant. Plaintiffs also stated that, "[a]lthough Defendants did not plead the existence of an easement along the path of Plaintiffs' buried 36-inch 'main drain', Plaintiffs have confirmed that their main drain follows approximately the same path as the open ditch known for many years as Red Bridge Slough . . . ."

The trial court issued a statement of decision (entitled "Final Judgment") setting forth the easement descriptions found in the amended cross-complaint for the three remaining drain locations, which the court described as the "discharge points and the course or path of surface waters flowing therefrom over and across Plaintiff[s'] land that this Judgment addresses." The court's discussion of the significance of Red Bridge Slough quoted above remained unchanged from that in its tentative decision.

Notwithstanding the court's reference to three drain locations in the statement of decision, the form of judgment prepared by defendants and entered by the court identified as an additional, fourth easement, the "area formerly know as Red Bridge Slough . . . ." Plaintiffs filed a motion to correct or set aside the judgment, asserting the judgment did not conform to the statement of decision, because, inter alia: (1) the descriptions of the second and third easement locations were inaccurate and ambiguous; and (2) the fourth easement for Red Bridge Slough was not pled in the cross-complaint nor identified as an easement in the statement of decision.

At the hearing on the motion, defendants argued that without the Red Bridge Slough easement the other drains would have no meaning and that the pleadings referred to the slough, as did testimony and maps presented at trial. The court agreed: "We did refer to Red Bridge Slough throughout the trial. It was the chief . . . feature of the topography out there that was

litigated here. And to remove reference in the decision [to] Red Bridge Slough . . . would eviscerate much of what was done."

The court, however, vacated the judgment and requested that the parties draft mutually acceptable easement descriptions. Though not for lack of trying by the parties (and the court), this effort proved unsuccessful. The court entered an amended final judgment, prepared by defendants, granting four prescriptive easements for drainage to defendants, including Red Bridge Slough, and finding in favor of defendants on plaintiffs' claims. Plaintiffs filed a timely appeal from the amended judgment.

DISCUSSION

I

Prescriptive Easements

Plaintiffs challenge the prescriptive easements granted to the District on several bases, none of which establish the trial court committed error.

A. *Nature, Scope, and Extent of Use of the Easements*

Plaintiffs contend that the easements are defective, because the "trial court was required to define the character, volume, scope, and extent of the use so that the prescriptive easements awarded did not increase the burden on [plaintiffs'] property. The description of the prescriptive easement granted should have included a quantification of the volume of water that can flow onto [plaintiffs'] property." We disagree.

The judgment stated the easements were for the "purpose of discharging surface water and irrigation tail water run-off."[4] In the statement of decision, the court observed: "The precise volume, duration, time of year and location on Plaintiffs' land where Defendants' runoff may flow or stand cannot, as requested by Plaintiff[s'] in its Request for a Statement of Decision, be specifically quantified. Implicit in this Judgment is the limitation on the use of the prescriptive easement found herein that such volume, times and locations are those which have historically been associated with Defendants['] use of the prescriptive easement. Of course, excessive use of an easement may be enjoined [citation] or may actually result in a forfeiture of such easement [citation]."

The trial court correctly determined that a prescriptive easement to discharge water need not specify the exact volume of water allowed. It is settled that an easement may exist to discharge surface waters upon the land of another, other than by natural flow, without diminution or disturbance. (Civ. Code, § 801; *Hails v. Martz* (1946) 28 Cal.2d 775, 778.) Such an easement may be obtained by prescription, that is, by continuous use of the easement for five years, in a manner that was open, notorious, visible, hostile, and adverse to the owner of the burdened land. (Civ. Code, § 1007; Code Civ. Proc., § 321;

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[4] "Tailwater" is defined as "excess surface water draining esp. from a field under cultivation." (Merriam-Webster's Collegiate Dict. (10th ed. 1994) p. 1201.)

Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570.)

Permissible use of a prescriptive easement is determined by the use made during the five-year prescriptive period, and the owner of the easement may not injuriously increase the burden of the easement on another's land. (See Civ. Code, § 806; *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 594 (*Twin Peaks*) ["The allowable usage of the prescriptive easement is defined by its historical usage"].) This limitation, however, does not immutably fix the use at historical levels for all time. The extent of an "easement for drainage and protection is that which the parties might reasonably expect from the future normal development of the dominant tenement." (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 356, fn. 17 (*Locklin*) [use of an easement must be reasonable]*; Applegate v. Ota* (1983) 146 Cal.App.3d 702, 711.)

This limitation based on historical use also does not mean the volume of water must be exactly quantified. More general evidence of historical usage is sufficient to indicate the extent of use without assigning it a precise number. (See *Lindsay v. King* (1956) 138 Cal.App.2d 333, 344 ["Appellants seem to believe that there can be no prescriptive right unless the quantity of user is fixed by a definite, unvarying quantitative amount. While the extent of use must be shown by one claiming adverse use [citations], the nature of the proof of user varies according to the circumstances"]; see also *De La Cuesta v. Bazzi* (1941) 47 Cal.App.2d 661, 672 [rejecting appellants' complaint

that "the court did not limit the number of cattle that may enjoy the benefit of the claimed easement"].)

In this instance, there was testimony by Mr. Pires, the owner of a portion of plaintiffs' property from 1972 to 1995, identifying the drains through which surface and irrigation water flowed on the property, including Red Bridge Slough. Mr. Pires even quantified the water level when he testified that, even in dry years, the water would back up and form ponds in the low field at Airport Way to a depth of five to ten feet. This evidence was sufficient to indicate the amount of water in the easement, even if it was not more specifically measured in the slough itself or the subsidiary drains that fed into it. (See *Enos v. Harmon* (1958) 157 Cal.App.2d 746, 750 [evidence that ditch could irrigate plaintiff's property in a certain time was sufficient to describe course and maximum previous water flow in easement].)

To be sure, plaintiffs' replacement of Red Bridge Slough with a single 36-inch pipeline significantly lessens the usefulness of this evidence as a point of comparison in the future. But it is plaintiffs' actions that have created any uncertainty by so significantly altering and narrowing the Districts' water conveyance system. (Cf. *Morris v. George* (1943) 57 Cal.App.2d 665, 677 [where judgment requiring restoration of irrigation ditch was attacked as uncertain, court observed that "if appellants desired to have what they were required to do described with such meticulous particularity as their brief would indicate, they should have had a detailed

survey and description of said ditch before they destroyed it"].)

Plaintiffs are not left defenseless against overuse of the easement despite the absence of exact quantification of the amount of water allowable. Any unusual or extraordinary use that injures plaintiffs' property may be controlled by the court. (See *De La Cuesta v. Bazzi, supra,* 47 Cal.App.2d at p. 672; see also *Smith v. Rock Creek Water Corp.* (1949) 93 Cal.App.2d 49, 53; 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 467, pp. 646-647.) Based on their long involvement with these properties and knowledge of the level of water intrusion on the land, plaintiffs' principals will surely know if the usage increases or changes materially.

Plaintiffs rely on several cases involving inaccuracies or uncertainty in easement descriptions regarding the physical width of, and traffic traveling over, roadway easements. (See, e.g., *Thompson v. Dypvik* (1985) 174 Cal.App.3d 329, 340-342; *Twin Peaks, supra,* 130 Cal.App.3d at pp. 594-595; *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 772; *Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 728-730.) These cases are factually inapposite. The width of a road is static; the type of traffic over it is easily observable; and the burden on the land from, for example, a 60-foot wide road easement as opposed to a 12-foot one is obvious.

We make the final observation that plaintiffs did not present any evidence that the present use of the easement was greater or different from historical usage, or that there was

any foreseeable prospect that it would be. To the contrary, Ron McManis testified that water intrusion on the land from all sources, including water flowing through these easements, had not changed in the more than 10 years he had been involved with the property. Plaintiffs' insistence that volume of water be specifically quantified, under circumstances where it would be difficult to do so, appears to be an attempt to exploit a technical defense to easements where the level of usage was not genuinely in doubt.

We conclude the description of the prescriptive easements to permit discharge of surface waters at historical levels was sufficient without exact quantification of the volume of water.

B. *Red Bridge Slough*

Plaintiffs contend "the trial court . . . committed a legal error by awarding the District the fourth prescriptive easement [for Red Bridge Slough] which was never identified in any pre-trial pleading or litigated at trial." We disagree with both assertions. The cross-complaint identified Red Bridge Slough as the drain for the specific easements plaintiffs' initially sought, and evidence at trial confirmed that the slough drained plaintiffs' property and much of the District. There was no error in granting an easement for the slough.

As mentioned, Red Bridge Slough was not denominated a separate easement prior to the initial judgment entered by the court. The cross-complaint identified one specific drainage easement defendants sought to protect, and the amended cross-complaint added three more, but not Red Bridge Slough. However,

defendants' pleadings contained numerous references to the Red Bridge Slough as the central drain for the subsidiary drains alleged as the four easements, and the location of the slough was expressly set forth on maps attached as exhibits to the pleadings.[5]

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[5] The initial cross-complaint claimed an easement described as: "Drain located at the northeast corner of Lot 19 of the River Junction Farms, subdivision 2 (near the intersection of Two Rivers Road and Division Avenue) which drain runs along the westside [*sic*] of Two Rivers Road and drains into Red Bridge Slough." The cross-complaint also stated: "A copy of a map depicting the location of the easement for drainage is attached hereto as Exhibit 'A' and made a part hereof by this reference." The attached exhibit highlighted the path of the easement which was labeled "RED BRIDGE SLOUGH".

The amended cross-complaint identified four drainage easements, including the easement described in defendants' initial cross-complaint. The additional easements were described as:

"(b) Drain located near the north-south lot line between Lots 18 and 9 of the River Junctions [*sic*] Farms, subdivision 2 which drains into Red Bridge Slough.

"(c) Drain located at the intersection of Division Avenue and Airport Way which enters Lot 26 of the River Junction Farms, subdivision 2 at the northwest corner of said lot.

"(d) Drain located on the east side of Garden Avenue and runs in a north-south direction from Division Avenue, through Lots 3, 4 and 5 of the River Junction Farms, subdivision 2, to a point near the northwest corner of Lot 6 of said subdivision then west across Lot 7 of said subdivision and drains into Red Bridge Slough."

Like defendants' initial pleading, the amended cross-complaint stated: "A copy of a map depicting the locations of the easements for drainage is attached hereto as Exhibit 'A' and made a part hereof by this reference." The referenced map marked the location of the specific easements alleged, but also

Red Bridge Slough was also a prominent feature of the litigation. Testimony at trial confirmed that Red Bridge Slough historically and presently was used as the main drain for plaintiffs' properties and most of the District. Harold Mortensen, the retired secretary for the board of the District and the person most knowledgeable about the District, testified that Red Bridge Slough was, inter alia, "the main drain of 3000 acres in the bottom land" of the District. A neighboring landowner, Cornelius DeRuyter, similarly testified that the Red Bridge Slough is where "most all of the district drainage goes." Mr. Pires, the former owner of plaintiffs' land, also indicated that the slough was the "master drain" on the property.

In a posttrial brief, plaintiffs referred to the 36-inch pipeline they installed as their "main drain" and confirmed it "follows approximately the same path as the open ditch known many years ago as Red Bridge Slough . . . ." And, as previously quoted, the trial court discussed at length in its decision after trial Red Bridge Slough as the major water conveyance traversing plaintiffs' property and its significance to drainage in the District. Furthermore, when plaintiffs disputed the addition of the slough as a specific easement awarded by the judgment, the court recognized that the utility of the other

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highlighted the path of a drainage ditch crossing plaintiffs' property labeled "Red Bridge Slough."

The prayer for relief in both the cross-complaint and amended cross-complaint demanded a preliminary and permanent injunction against obstruction of, and requiring removal of obstructions to, the "aforementioned easement[s]".

easements depended upon an easement for the "main drain," Red Bridge Slough.

From the pleadings, the evidence, and the findings, we have no doubt the trial court had the power to grant an easement comprising the Red Bridge Slough, notwithstanding defendants failure to allege it specifically in their pleadings. Code of Civil Procedure section 580, subdivision (a), provides in relevant part: "The relief granted to the plaintiff, if there is no answer, cannot exceed that which he or she shall have demanded in his or her complaint . . . but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." Contrary to plaintiffs' assertion that defendants' recovery is restricted to the specific drainage easements asserted in the cross-complaint, "a court of equity is not limited in granting relief by demands and offers of parties themselves but may fashion a decree which will do substantial justice to all parties . . . ." (See *Applegate v. Ota, supra,* 146 Cal.App.3d at p. 712 [court did not err in granting 20-foot wide prescriptive easement when complaint claimed easement for paved road that was only 10 feet wide]; see also *Woods Central Irrigating Ditch Co. v. Porter Slough Ditch Co.* (1916) 173 Cal. 149, 152-154 [in action to quiet title to river water, court had authority to divide and apportion water between river and slough]; *McLean v. Ladewig* (1934) 2 Cal.App.2d 21, 24-25 [court had authority to award mining claim whose description differed from that pled in the complaint].) "Moreover, the matter of

pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury." (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 543.)

The pleadings referred to Red Bridge Slough and indicated its significance, the issue was litigated at trial and, it is fair to say, it was the central factual finding of the court set forth in its statement of decision. Under Code of Civil Procedure section 580, the court had authority to grant a prescriptive easement for Red Bridge Slough, which was consistent with the case made by the cross-complaint and within the issues of the litigation.

C. *Easement to Store Water*

Plaintiffs' last claim of error concerning easements is a narrow one. The trial court ruled that a "finding of [a] prescriptive easement is a defense to claims of trespass, by flowing water onto the land of another [citation]; nuisance [citation]; and inverse condemnation [citation]." (Underscoring in original.) Plaintiffs argue: "While the court correctly cited the law regarding prescriptive easements to flow water onto the land of another, it failed to address the issue of water storage on another's land." Plaintiffs reason that the prescriptive easement defense fails because the scope of the easement did not include the right to store water on their land.

This contention has no merit. It equates the periodic, historical ponding or standing water in plaintiffs' lowest field where the Red Bridge Slough exits their property with "storing

water."[6] At trial, plaintiffs' counsel had difficulty inducing even plaintiffs' expert to tentatively endorse this characterization:

"Q. As a result of [water coming back onto plaintiffs' property because of the water level restricting flow into Red Bridge Slough] and what you've described in the corner of Airport Way and Division Avenue, is it your opinion the Reclamation District is, in effect, storing water on the plaintiff's land or under it?

"A. By keeping the water level higher than it -- than it could be, yes. The answer is water is coming back in."

Taking the cue from plaintiffs' expert, the answer to plaintiffs' contention is that water backup is water backup, not water storage in the ordinary sense of the word "store", e.g., "[t]o reserve or put away for future use." (American Heritage Dict. (2d college ed. 1976) p. 1221.) The water backing up onto plaintiffs' property did not serve as store to be drawn on later. There is such a thing as an easement to store water but it applies to water storage facilities, such as reservoirs and the like. (See, e.g., *Otay Water Dist. v. Beckwith, supra,* 1 Cal.App.4th at pp. 1044-1045; see also *Cavanaugh v. Wholey* (1904) 143 Cal. 164, 168; *Chapman v. Sky L'Onda etc. Water Co.*

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[6] Contrary to plaintiffs' contention that the trial court did not address anything but water flow easements, in the statement of decision, the court observed it was difficult to specifically quantify for purposes of a prescriptive easement the water runoff which "may flow or *stand*" on plaintiffs' property. (Italics added.)

(1945) 69 Cal.App.2d 667, 679; *Massetti v. Madera Canal & Irrigation Co.* (1937) 20 Cal.App.2d 708, 718 (*Massetti*).) There was no evidence the District was storing water on plaintiffs' property in a reservoir or anything like it.

II

Negligence

As set forth in the background section, the trial court did not find that the District's prescriptive easements defeated plaintiffs' negligence claim, as it did their claims for trespass, nuisance, and inverse condemnation. This hesitancy derived from the court's inability to find case authority supporting the proposition, despite its intuitive sense that a negligence claim (based on the same facts) should be given the same treatment as plaintiffs' other claims. The court nonetheless ruled that defendants were not negligent, that is, they did not breach the duty to provide drainage to plaintiffs' property. (See *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 197.)

Plaintiffs challenge, on five grounds, the court's determination that the District was not negligent. They contend the trial court erred: (1) in not "requir[ing] the District to prove the existence of a water conservation program"; (2) when it did not require the District to "maintain its facilities"; (3) "in refusing to find that the District unreasonably burdened [plaintiffs] with excess irrigation drainage"; (4) by not "requir[ing] the District to 'reclaim' [plaintiffs'] parcels for agricultural purposes"; and (5) "in not recognizing a duty on

the part of the District to de-water [plaintiffs'] property after flood events." (Bold type and unnecessary capitalization omitted.)

We need not consider the merits of the first four of the contentions quoted above because we conclude the prescriptive easements awarded constitute a defense to all of plaintiffs' legal claims, including negligence, addressed to actions permissible under the easements. The essence of these four contentions is that the District was negligent because the conduct complained of resulted in an unreasonable amount of water flowing or standing on plaintiffs' property. For example, plaintiffs contend "the volume of tailwater that flows onto their property during the summer months is unreasonable because of the District's failure to impose a water conservation program . . . ." Plaintiffs' claims concerning facility maintenance, unreasonable amount of excess irrigation water, and reclamation have a similar thrust. However, the easements awarded permit the District to flow or stand water on plaintiffs' property as had been done for many, many years. Plaintiffs have no legal claim that the District was negligent in doing that which it acquired a legal right to do by prescription. A prescriptive easement is a defense to a claim of negligence, just as much as it is a defense to plaintiffs' other legal theories (nuisance, trespass, and inverse condemnation).[7]

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[7] It makes no difference that the trial court concluded otherwise in finding for defendants. We review the court's

While our review (like the trial court's) did not disclose case authority where a party successfully asserted a prescriptive easement to defeat a negligence claim, a line of cases imply a valid easement is a good defense. Courts applying the well-known rule that owners of irrigation systems are liable for damages to another's crops or property from overflow or leakage on account of negligence in the construction, operation, and maintenance of canals or ditches have often confronted defendant canal owner's defense that a prescriptive easement existed to discharge such water. (See, e.g., *Ketcham v. Modesto Irr. Dist.* (1933) 135 Cal.App. 180, 186-187, 191-192; *Edmonds v. Glen-Colusa Irr. Dist.* (1933) 217 Cal. 436, 444, 446; *Nelson v. Robinson* (1941) 47 Cal.App.2d 520, 526-528; *Massetti, supra,* 20 Cal.App.2d at pp. 714-718.) In at least one of these decisions, *Niegel v. Georgetown Divide Water Co.* (1947) 78 Cal.App.2d 445 (*Niegel*), a prescriptive easement was expressly referred to as a defense to a negligence claim. The plaintiff in that case brought an action for negligent maintenance of a ditch crossing his land, and, in the answer, "[a]s a separate affirmative defense, defendant alleged that by reason of the continual seepage that has taken place periodically ever since the ditch was constructed, it had acquired a prescriptive right to permit the same." (*Id.* at p. 446.) Unlike the present case, however,

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action, not its reasoning. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1482; *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 893.)

these prescriptive easement claims/defenses were rejected, principally because of the defendants' inability to establish the elements. (See, e.g., *Niegel, supra,* 78 Cal.App.2d at p. 446; *Massetti, supra,* 20 Cal.App.2d at p. 718.)

There is no indication in this line of cases of a distinction between negligence and other claims, i.e., that a negligence cause of action was immune from the defense that a prescriptive right existed to engage in the conduct complained of, whereas other legal claims such as trespass were subject to the defense. After all, a prescriptive easement does not arise unless the use of the easement infringes the rights of, and causes damage to, the owner of the land over which the easement travels. (*Nelson v. Robinson, supra,* 47 Cal.App.2d at pp. 526-528; *Hahn v. Curtis* (1946) 73 Cal.App.2d 382, 385-389.) During the prescriptive period, the owner could have brought any applicable legal claims such as nuisance, trespass, inverse condemnation (in the case of a public entity defendant), and negligence, against the adverse use, but did not. These are simply legal theories that attack the same conduct. But once a prescriptive right has matured after five years or more of use, use at the level established in the prescriptive period cannot give rise to a claim for damages under a negligence theory or any other legal theory that a property owner previously might have been able to assert.

We emphasize again that the evidence does not establish use in excess of the use during the prescriptive period. It is plainly no defense to an action for damages or equitable relief

that a defendant has a prescriptive right if the circumstances indicate it has been unreasonably exceeded. Use of an easement must be reasonable and, of course, unreasonable conduct is the touchstone of a negligence cause of action. (See *Locklin, supra,* 7 Cal.4th at p. 356, fn. 17; BAJI No. 3.10.) In this instance, where there was no excess use in evidence, defendants' prescriptive right to flow water across plaintiffs' land at historic levels constituted a sufficient defense to plaintiffs' claim that negligent acts or omissions on the part of defendants caused water to flow or stand in unreasonable amounts on plaintiffs' land.

However, the prescriptive right to flow and stand surface and irrigation water on plaintiffs' property does not squarely meet plaintiffs' fifth negligence allegation that the District wrongly delayed draining water from their property after a 1997 flood and levee break. Nonetheless, sufficient evidence supports the trial court's finding that defendants were not negligent with respect to this uncommon but occasional event.

In early January 1997, the levee of the San Joaquin River broke, flooding plaintiffs' property and much of the District. The Army Corps of Engineers repaired the break by mid-January, but water remained on plaintiffs' property until March.

Plaintiffs state "it is not [their] contention that the District is responsible for the levee failure and flooding. Instead, [plaintiffs] assert the District was unreasonable in that after the levee was repaired following the flood the District took no steps to dewater [plaintiffs'] property and

thereby caused the water to remain on the property for an unreasonably long period of time, causing damage."

The steps plaintiffs argue should have been but were not taken -- i.e., dredging Red Bridge Slough, increased maintenance and operation of pumps to remove water, reactivating a disconnected pump -- are the same deficiencies plaintiffs find with the District's operation and maintenance of its facilities under non-flood circumstances. But plaintiffs do not provide any legal authority for the requirement that the District must make extraordinary efforts to drain floodwaters, where, as here, it is conceded the District is not liable for the flooding.

Moreover, the trial court found "insufficient evidence was presented by [plaintiffs] to support" their positions that the District was negligent for failure to maintain Red Bridge Slough by dredging or to run pumps to de-water plaintiffs' property. Despite plaintiffs' attempt to characterize the court's action as an erroneous failure to make a finding, we understand the court to have found that the District was not negligent in the maintenance and operation of its facilities, that is, the evidence did not establish the District's negligence. Generally, the issue of a defendant's negligence presents a question of fact. (See *Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 652.) If there is substantial evidence to support the finding, the appeal must fail. (See *Cooper v. Bray* (1978) 21 Cal.3d 841, 856; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*).)

The record contains substantial evidence to support the court's finding. The most striking evidence regarding the non-negligent operation of the District's drainage system, as noted by the trial court, was the plaintiffs' expert witness, Dr. James Schaaf, testifying to his agreement that the District's drainage system operates "fairly well."[8] Dr. Schaaf also agreed that lack of maintenance was a minimal factor in restricting water in Red Bridge Slough. Additionally, plaintiffs make much of the fact that the District disconnected a pump near the corner of their property adjacent the San Joaquin River prior to the 1997 flood to save the cost of its operation. But they omit

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[8] Since plaintiffs contend this testimony was taken out of context by the trial court, we quote the exchange in full:

"Q. Since your deposition, have you had a change in opinion as to how the drainage system of the defendants' operates?

"A. No, I think it still operates the same.

"Q. So it's correct to say you're still of the opinion that the drainage system functions very [*sic*] fairly well?

"A. Based on what they have there, that's correct. You want to keep elevation 14. Everything can be improved, particularly during the wintertime. When you're saying some of the choke points would be fairly low it's during the summertime. It's fairly reasonable. You want to keep elevation 14."

Plaintiffs point out that Dr. Schaaf clarified that the drainage system operates reasonably well if a water level of 14 feet in Red Bridge Slough is desired, but plaintiffs require a level of 12 feet to keep water from backing up on their property. That the drainage system does not meet plaintiffs' particular requirements, however, does not nullify the evidentiary effect of Dr. Schaaf's testimony that the drainage system was "fairly reasonable" in its present condition.

mention of Mr. Mortensen's testimony that the pump was an experiment that the District shut down in the 1960's because it was determined not to be an aid in reducing water and in fact caused seepage under the levee such that it was almost breached.[9] We conclude substantial evidence supports the court's finding that the District was not negligent in draining floodwater from plaintiffs' property after the 1997 flood.

III

Cross-Appeal

On cross-appeal, defendants seek to alter the judgment to: (1) delete language from the descriptions in the judgment of easements one and two, which they argue the evidence does not support,[10] and (2) add an injunction against interference with

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[9] On the whole, plaintiffs' briefs set forth only their own evidence supporting their version of the facts. It should be remembered that on a contention that the findings are not supported by substantial evidence, the appellant is required to set forth all material evidence on the issue and a one-sided presentation constitutes a waiver of the alleged error. (See *Foreman, supra,* 3 Cal.3d at p. 881; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.)

[10] The subject of this portion of the cross-appeal is easements one and two, which currently read:

"(1) The drain line located at northeast corner of Lot 19 of the River Junction Farms, subdivision 2 (near the intersection of Two Rivers Road and Division Avenue) **which drain is within the area 30 feet of the easterly side of said Lot 19,** beginning at the northerly boundary line of said lot and runs along the west side of Two Rivers Road and drains into the area formerly known as Red Bridge Slough which currently is occupied by a 36" poured-in-place concrete pipe which is where the area for said easement terminates.

the easements granted, essentially converting the preliminary injunction to a permanent injunction. We acknowledge that if possible the judgment should be modified to put an end to the lengthy litigation between these parties in a single appeal. (See *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 219.) But we cannot modify the judgment as requested, because the record is insufficient to do so and events outside the record and subsequent to the judgment bear on the modification.

Regarding the easement descriptions, there is no clear evidence in the record from which we can determine that the changes to the easement descriptions are warranted or that the descriptions after deletion are accurate. "It has long been recognized that [an appellate court] has the power to modify the conclusion of the court below, where the record supports it." (*Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 279; see also *Fox v. Hale & Norcross S. M. Co.* (1898) 122 Cal. 219, 221-222; *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566; Code Civ. Proc., §§ 43, 906.) The power

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"(2) Drain located near the north-south lot line between Lots 18 and 9 of the River Junction Farms, subdivision 2 which drains into the area formerly known as Red Bridge Slough which currently is occupied by a 36" poured-in-place concrete pipe **and which is within an area 35 feet wide and centered on the north-south lot line between Lots 18 and 9** commencing at the northerly boundary line of Lots 18 and 9 and terminating at the 36" poured in place pipe."

The portion of the easements defendants wish to delete is indicated by bold text.

to modify a judgment includes the power to alter the description of a prescriptive easement, where, for example, "the proof showed the exact location of the roadway, the existence of which was not disputed." (*Hutton v. Ormando* (1935) 3 Cal.2d 305, 308 [map in evidence showed location of roadway easement, which also was described in deed by which defendant owner of the land burdened by easement received the land].) But "[i]f the record does not clearly show what the correct judgment should be, modification is inappropriate, and the proper procedure is to reverse the judgment." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 757, p. 782, citing *Machado v. Machado* (1914) 26 Cal.App. 16, 18; *Boyle v. Hawkins* (1969) 71 Cal.2d 229, 232, fn 3.)

This case falls into the class where modification is inappropriate because the evidence is not sufficiently clear. Defendants do not cite support in the record for the change to easement one, arguing rather that "[t]here was no evidence submitted at trial that supports the language" they ask be deleted. Defendants also maintain "there is no drain line within '30 feet of the easterly side of said Lot 19'", but do not cite any portion of the record demonstrating that the drain is not at that location. Defendants' assertion raises the question how the language came to be included in the judgment if there is no evidence to support it, and they make no effort to explain the error (which should be no great task, when, after all, defendants prepared the form of judgment). The judgment in this respect is a mystery, which is not an appropriate

circumstance for modification by a reviewing court. (See *Milo v. Prior* (1930) 210 Cal. 569, 571.) Moreover, defendants' approach to substantiating the modification requires this court to examine more than a thousand pages of trial transcript, plus dozens of exhibits, to determine whether it is "clear" that there is no evidence to support the inclusion of this language. This effort would seem near impossible where there is no evidence to show the source of the incorrect language or the correct location of the easement.

As to the second easement, defendants make the same argument that the language they wish deleted is not supported by the record and the drain is not located at the site specified in the judgment. Here, defendants point to some evidence about the true location of the easement, but it is far from clear. Defendants cite testimony by Mr. Mortensen about the location of a drainage pipe on plaintiffs' property, but there is nothing to tie it to easement two described in the judgment. For example, Mr. Mortensen did not testify that the drainpipe he was describing was easement two, as alleged in the amended cross-complaint. To further confuse matters, defendants offer three alternative ways of describing the easement's location (two supported Mr. Mortensen's testimony and one by a trial exhibit by plaintiffs),[11] and conclude cryptically that "[t]his further description should be added to the description."

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[11] Defendants state: "In fact, the evidence showed that this pipe is located approximately 300 feet west of the north-south

Under such circumstances the record is the opposite of clear and modification of the judgment is not appropriate. Therefore we will reverse this portion of the judgment and remand to the trial court for a new trial to define correctly the two easements.

Defendant's request for the addition of a permanent injunction to the judgment at first would seem to be more solid. In the cross-complaint, defendants sought a preliminary and permanent injunction against plaintiffs' obstructing defendants' easements and requiring plaintiffs to remove obstructions or replace or reconstruct drains or other water conveyances consistent with defendants' easements. Defendants obtained a preliminary injunction to protect the alleged prescriptive easements pending trial. But for some reason, again unexplained by defendants, the judgment did not include a permanent injunction, notwithstanding the award of prescriptive easements. However, we cannot assume that this was mere inadvertence and the trial court would have simply converted the terms of the preliminary injunction into a permanent injunction. As the Supreme Court said in *San Diego W. Co. v. Steamship Co.* (1894) 101 Cal. 216, 220-221: "It is true we sometimes speak of making the preliminary injunction perpetual. But while the injunction by the judgment may be the same in scope and effect, it is a

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lot line between lots 18 and 9 [citations] or approximately along the lot line between lot 168 and 169 if extended under Division Road, [citation] or at the edge of the R7 block as depicted [on plaintiff's trial exhibit one] [citation]." (Underscoring in original.)

restraint imposed by a new and distinct command. It is a new injunction which may be and often is different in its effect and terms." (See also *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 253.) How to phrase, as well as, when to issue a permanent injunction involves an exercise of discretion by the trial court. (See *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041 (*Dawson*).) Defendants' pleading and the terms of the preliminary injunction do not provide this court a basis to take over that exercise of discretion from the trial court.

Furthermore, like any injunction, a permanent injunction is directed at future conduct and should not be issued unless there is evidence the acts complained of will probably recur. (See *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1658; *Dawson, supra,* 28 Cal.App.4th at p. 1040.) Defendants contend that a permanent injunction is necessary here, because the evidence at the trial showed that plaintiffs had altered or blocked certain of the drain easements and, after trial and judgment, did so again. By this line of reasoning, defendants would involve this court in reviewing matters outside the record and occurring subsequent to the judgment.[12] As a

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[12] On appeal, defendants filed a motion with this court for an order to preserve the status quo and to enjoin plaintiffs from interfering with the easements pending appeal. This court denied the motion, noting that the judgment granting defendants prescriptive easements is not stayed pending appeal, the trial court retains jurisdiction to enforce the judgment, and "[t]o the extent respondents contend that appellants' conduct violates

general rule, we cannot. (9 Witkin, Cal. Procedure, *supra,* Appeal, §§ 328, 330, pp. 369-372.) Defendants have not presented circumstances that justify an exception to the ordinary rules, e.g., where a permanent injunction has been entered and circumstances requiring its modification have arisen postjudgment. (*Id.*, § 332, p. 373.) Here, postjudgment circumstances bear on whether an injunction should be issued and how it should be phrased in the first place. We must follow the general rule that these are matters for the trial court, which as noted, has all along retained jurisdiction to enforce the judgment awarding defendants prescriptive easements on plaintiffs' property.

DISPOSITION

The judgment is reversed regarding the description of easements numbers one and two, and the cause remanded to the superior court to conduct a new trial solely to determine the correct description of easements one and two. Otherwise, the judgment is affirmed. In the interest of justice, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

NICHOLSON, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.

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the judgment appealed from, they should seek relief in the superior court."